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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

DANIEL J. MCCARTHY, DANIEL VASQUEZ
and ROBERT BORG,
Petitioners,

vs.

JOSEPH TOUSSAINT, et al.,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SANFORD JAY ROSEN
(Counsel of Record)
BARBARA Y. PHILLIPS
SUSAN S. FIERING
PAUL A. DI DONATO
ROSEN & PHILLIPS
155 Montgomery Street
8th Floor
San Francisco, CA 94104
Telephone: (415) 433-6830
*Attorneys for Respondents**

* Additional Counsel on Inside of Cover

53PP

BERNARD ZIMMERMAN
SARAH G. FLANAGAN
MARK A. CHAVEZ
PAULA LEVITAN
235 Montgomery Street
12th Floor
San Francisco, CA 94104
Telephone: (415) 983-1100

DONALD H. SPECTER
MARGARET LITTLEFIELD
STEVEN FAMA
PRISON LAW OFFICE
Main Street
General Delivery
San Quentin, CA 94964
Telephone: (415) 457-9144

ELLEN SUE GOLDBLATT
c/o Protection &
Advocacy, Inc.
1330 Broadway, Ste. 1550
Oakland, CA 94612
Telephone: (415) 839-0811

SIDNEY M. WOLINSKY
ANITA P. ARRIOLA
PUBLIC ADVOCATES, INC.
1535 Mission Street
San Francisco, CA 94103
Telephone: (415) 431-7430

JAMES C. STURDEVANT
STURDEVANT & ELION
120 Montgomery Street
Suite 1800
San Francisco, CA 94104
Telephone: (415) 392-4140

ANTONIA HERNANDEZ
DENISE M. HULETT
MEXICAN AMERICAN LEGAL
DEFENSE AND
EDUCATION FUND
604 Mission Street
10th Floor
San Francisco, CA 94105
Telephone: (415) 543-5598

JULIUS CHAMBERS
DEBORAH FINS
99 Hudson Street
16th Floor
New York, NY 10013
Telephone: (212) 219-1900

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether in a civil rights action brought under 42 U.S.C. § 1983, a Court of Appeals may affirm the district court's authority to order individual prisoners released on a proper showing from segregation to less restrictive general population custody during an interim period that will last only until lock-up conditions meet conditions meet constitutional minima, in circumstances where (1) state prison officials are operating prison lock-up facilities that uncontestedly violate the Eighth Amendment to the Constitution of the United States, (2) the prisoners enjoy a liberty interest in being free from placement or retention in the lock-up units, and (3) for a decade the defendants have persistently violated injunctions that were designed to remedy the unconstitutional lock-up conditions and to control unjustified, arbitrary and

capricious placement and retention of prisoners in those conditions? (See Question No. 2 in Joseph Toussaint, et. al.'s, related Petition for Writ of Certiorari in No. 86-1587).

2. Whether in a case in which the Court of Appeals affirmed the findings of a district court that defendants' paging system for providing access for lock-up inmates to prison law libraries is both intrinsically and as operated inadequate for meaningful access to the courts, and the defendants have violated prior court orders addressing access to the law libraries, the Court of Appeals may require that the defendants' also provide physical access to law libraries and/or legal assistance to these inmates?

LIST OF PARTIES

Defendants-Petitioners are Daniel McCarthy (Director, California Department of Corrections (CDC)), and the wardens at the California State Prisons at San Quentin (Dan Vasquez) and at Folsom (Robert Borg). Plaintiffs-Respondents constitute a class of maximum security, minimum privilege inmates in the custody of the CDC at the California State Prisons at San Quentin and Folsom (as well as at the California Training Facility at Soledad and the Deuel Vocational Institution (DVI)). The individual class representatives are Joseph Toussaint, Michael Cowans and Welve Johnson.

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No. 86-1588

IN THE

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DANIEL J. McCARTHY, DANIEL VASQUEZ
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JOSEPH TOUSSAINT, et al.,

Respondents.

OPPOSITION OF JOSEPH TOUSSAINT, ET AL., TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The plaintiff class, constituting several thousand lock-up inmates subject to petitioner-defendants' custody and control in California maximum security prisons, by the undersigned counsel, respectfully request that this Court deny defendants' Petition for Writ of Certiorari. However, regardless of

whether this Petition is denied or granted, plaintiffs urge that the Court grant their related Petition for Writ of Certiorari in No. 86-1587.

Plaintiffs contend that no grounds exist for granting the defendants' Petition for Writ of Certiorari as: (1) the uncontested facts demonstrate that the due process and court access remedies ordered by the United States Court of Appeals for the Ninth Circuit, that the defendants contest, are appropriate remedies in the context of this prison conditions lawsuit; (2) the decision of the Ninth Circuit in regard to these remedies does not conflict with any decision of this Court and does not raise an important unresolved question of law; and (3) the decision of the Ninth Circuit in regard to these remedies does not evidence a conflict among the circuits.

OPINIONS BELOW

The opinions below are identified in full in plaintiffs' related Petition for Writ of Certiorari in No. 86-1587 at 2-5 (hereinafter "Plaintiffs' Petition."), and in the defendants' Petition in the instant proceedings (No. 86-1588) at 1-2 (hereinafter "Defendants' Petition"). These opinions are included in both the Appendix to the Plaintiffs' Petition (hereinafter "Plaintiffs' Appendix" or "Pl.App.") and the Appendix to Defendants' Petition (hereinafter "Defendants' Appendix" or "Df.App.").

JURISDICTION AND STATUTES PRESENTED

These matters are accurately set forth in Defendants' Petition at 2-3 and Plaintiffs' Petition at 5-7. The relevant constitutional provisions are contained in Plaintiffs' Appendix and Defendants' Appendix.

STATEMENT OF THE CASE

An accurate Statement of the Case is included in Defendants' Petition at 3-9. An accurate and more complete Statement of the Case with respect to Question No. 1 in Defendants' Petition and Counter Statement of Question No. 1 in this Opposition (the due process question) is included in Plaintiffs' Petition at 7-25. Additional facts pertaining to the law library-court access question (No. 2) are included in Statement of Reasons for Denying the Petition, infra.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

GIVEN THE RECORD IN THIS CASE THE NINTH CIRCUIT'S DECISION THAT THE DISTRICT COURT MAY ORDER INDIVIDUAL PLAINTIFFS TRANSFERRED FROM UNCONSTITUTIONAL CONDITIONS IN LOCK-UP TO LESS RESTRICTIVE CONFINEMENT DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUITS AND DOES NOT RAISE AN IMPORTANT UNRESOLVED ISSUE OF FEDERAL LAW.

The Ninth Circuit has sustained the district court's authority, during an "interim period" that will last until the conditions in lock-up meet constitutional minima, to review lock-up retention decisions and to order transferred from lock-up units individual inmates whose placement in lock-up do not meet specified placement and retention criteria. Relying on Preiser v. Rodriguez, 411 U.S. 475 (1973), the defendants assert that habeas corpus is

the exclusive remedy for prisoners seeking release from lock-up because the lock-up prisoners seek release or transfer to less restrictive confinement. Contrary to defendants' assertion, the Ninth Circuit's decision is not inconsistent with this Court's decision in Preiser. Moreover, other decisions of this Court concerning challenges to tranfers to more restrictive confinement conclusively show that an action brought pursuant to 42 U.S.C. § 1983 is a proper means for a prisoner to seek a transfer from lock-up confinement.

A. The Controlling Decisions of this Court Make it Plain That the Ninth Circuit Correctly Sustained the District Court's Authority, In this Section 1983-Eighth Amendment Prison Conditions Case, to Order individual Inmates Transferred from Lock-up to General Population Units Upon a Proper Showing.

As the Ninth Circuit noted, the state prisoners in Preiser sued in federal district court under 42 U.S.C. § 1983 alleging that they were deprived of good-time credits improperly. See Preiser, supra, 411 U.S. at 476. The prisoners sought injunctive relief to compel restoration of the credits. Id. This Court held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal

remedy is a writ of habeas corpus." Id. at 500. See Toussaint v. McCarthy, 801 F.2d 1080, 1102-03 (9th Cir. 1986), Pl.App. 1, 88-89.

As the Ninth Circuit also observed (801 F.2d at 1103, Pl.App. 89-90), in Wolff v. McDonnell, 418 U.S. 539, 554-55 (1974), this Court held that Preiser only precludes restoration of credits in an action brought under 42 U.S.C. § 1983. The Court stated "that it was proper for the Court of Appeals and the District Court to determine the validity of the procedures for revoking good-time credits and to fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time already cancelled." Id. at 555 (footnote omitted).

The Ninth Circuit also correctly

noted (801 F.2d at 1103, Pl.App. 90) that, in the instant case, the district court did not restore credits nor release any inmate from prison. The district court, in essence, merely authorized its monitor to move individual prisoners from one location to another within the prisons upon appropriate showings. Such relief does not fall within the traditional core of habeas corpus. Hence the Ninth Circuit was correct in holding that the district court did not exceed its jurisdiction under 42 U.S.C. § 1983 by authorizing the transfer of prisoners from lock-up to less restrictive confinement, and that the plaintiffs need not exhaust state remedies before seeking this form of relief in federal court.

A number of other post-Preiser decisions of this Court show that habeas corpus is not the exclusive remedy for

state prisoners seeking placement in a less restrictive part of a prison. For example, in Meachum v. Fano, 427 U.S. 215 (1976), a prisoners' 42 U.S.C. § 1983 action sought, inter alia, "an injunction setting aside the ordered transfer [from a medium to a maximum security prison]." Id. at 222. The district court granted relief, ordering the prisoners returned to the general population of the medium security prison, and the Court of Appeals affirmed. Ibid. This Court reversed on the ground that due process was not implicated by the challenged transfers. However, the Court did not suggest that a civil rights action was an improper means to seek the requested relief. The companion decision to Meachum, Montanye v. Haymes, 427 U.S. 236 (1976), also considered a Section 1983 action challenging a transfer without suggesting

that such relief was not permitted in such an action.

In Vitek v. Jones, 445 U.S. 480 (1980), the district court's order enjoining a transfer of a prisoner to a mental hospital was affirmed. Again, this Court did not suggest that the prisoner must use habeas corpus to challenge the transfer, even though a transfer to a mental hospital would have clearly placed more restraints on the prisoner. Similarly, in Hewitt v. Helms, 459 U.S. 460 (1983) this Court considered a prisoner's due process action brought under 42 U.S.C. § 1983, which challenged his placement in administrative segregation, without suggesting that he had chosen the wrong form of action. Finally, in Olim v. Wakinekona, 461 U.S. 238 (1983), a prisoner convicted in Hawaii state court challenged by means of

a 42 U.S.C. § 1983 action his transfer to Folsom State Prison in California. In reviewing the Ninth Circuit's decision in that case, once again this Court did not suggest that habeas corpus was required to challenge the placement in the California prison.

Almost any action for injunctive relief by a prisoner who seeks to vindicate constitutional rights asks for less restrictive confinement, whether it be a request to enjoin practices restrictive of First Amendment rights, or for an order requiring the upgrading of conditions to meet Eighth Amendment standards. Would defendants require a habeas corpus petition to initiate all prison conditions actions except those seeking monetary relief?

Clearly, Preiser does not support such a wholesale revision of federal

jurisprudence. Nor does Preiser qualify the power of the district courts to provide a complete and full remedy both (1) for proven long-standing violations of the Eighth Amendment and (2) for persistent violation of court injunctions imposed both to eliminate cruel and unusual conditions and to assure full enjoyment of the due process that protects the prisoners' liberty interest in being free from arbitrary and unwarranted lock-up confinement. See Hutto v. Finney, 437 U.S. 678, 685-87 (1978). Those are the facts in this case.

The instant case involves confinement of hundreds of inmates in segregation for extended periods (often exceeding two years) on the basis of unreliable and undisclosed information for reasons often vague or unspecified

and unrelated to the conduct of the inmate. The conditions of confinement in the lock-up units at San Quentin and Folsom have for more than a decade grossly violated the Eighth Amendment. Toussaint v. McCarthy, 597 F.Supp. 1388 1393-1405, 1408-20 (Pl.App. 178-246, 257-323). Further, procedural safeguards established in this case more than a decade ago (and sustained by this Court) "have been consistently overlooked or disobeyed" by the defendants. 597 F.Supp. at 1418-19 (Pl.App. 310). The additional procedural protections imposed by a preliminary injunction in Toussaint v. Rushen, 553 F.Supp. 1365 (N.D.Cal. 1983) (Pl.App. 435), aff'd except as to food services, sub nom. Toussaint v. Yockey, 722 F.2d. 1490 (9th Cir. 1984) (Pl.App. 408), were also disobeyed. Toussaint v. McCarthy, supra, 597 F.Supp.

at 1407-08 (App. 255-257). Even more significantly, the evidence at trial in this case made it clear that the procedural protections imposed in Wright v. Enomoto, 462 F.Supp. 397 (N.D.Cal. 1976 Three Judge) (Pl.App. 549), summarily aff'd, 434 U.S. 1052 (1978) (Pl.App. 540), and the Toussaint preliminary injunction do not adequately protect against unjustifiable, arbitrary and capricious lock-up decisions. See Toussaint v. McCarthy, supra, 597 F.Supp. at 1405-07, 1415-16, 1418 (Pl.App. 246-255, 297-298, 308-310).

Examples abound of continued violations of the district court's orders at the time of trial. Inmates continued to be placed in lock-up without timely notice or hearing. 597 F.Supp. at 1406 (Pl.App. 251). The notice often was not "as required by the Court's order

[citations omitted] 'in sufficient detail to enable the prisoner to prepare a response or defense.'" Id. at 1406-07 (Pl.App. 251). The lock-up hearings tended to be perfunctory. Id. at 1407 (Pl.App. 251). Even if a determination was favorable to the prisoner, he might be retained in lock-up for substantial periods due to lack of cell space in general population. Id. at 1407 (Pl.App. 255). Thus, unjustified and arbitrary confinement in lock-up remained commonplace. Id. at 1415-16 (Pl.App. 297-299).

Under this Court's decision in Hutto v. Finney, 437 U.S. 678 (1978), consideration of unconstitutional conditions in lock-up, the duration of confinement in lock-up, the presence of a consistent pattern of unjustified and arbitrary lock-up decision making, and

disobedience of prior court orders are relevant to the 42 U.S.C. § 1983 remedy. In that case the Court considered both violation of previous orders and long standing unconstitutional conditions in lock-up, as well as the duration of lock-up confinement (437 U.S. at 685-87), as justifying a district court in Arkansas to enter "a comprehensive order [including a limitation on the length of time for which an inmate could be held in lock-up] to ensure against the risk of inadequate compliance." 437 U.S. at 687 (footnote omitted); see Hewitt v. Helms, 459 U.S. 460, 468 (1983); id. at 481 n. 4 (Stevens, J., dissenting). Cf. United States v. Paradise, 480 U.S. _____, 94 L.Ed.2d 203, 223-27, 231-32; id. at 234-35 (Powell, J. concurring); id. at 235-39 (Stevens, J. concurring). As Hutto makes plain, Preiser does not

control federal remedy or federal court jurisdiction in a prison conditions case like the instant one.

B. There Is No Conflict Between the Ninth Circuit Decision in this Case and Decisions of Other Circuits.

The defendants contend that there is a conflict between the Ninth Circuit's decision in this case and decisions of the Second, Fifth and Seventh Circuits, in that those Circuits "have recognized, a state prisoner seeking release from segregation must challenge his confinement there by a petition for writ of habeas corpus, not by an action for injunctive relief under the Civil Rights Act." Defendants' Petition at 12.

Defendants cite the following cases in support of their declared conflict. McCall-Bey v. Franzen, 777 F.2d 1178,

1191 (7th Cir. 1985); Boudin v. Thomas, 732 F.2d 1107, 1111 (2nd Cir. 1984); Jackson v. Carlson, 707 F.2d 943, 946 (7th Cir. 1983), cert. denied, 464 U.S. 861 (1983); McCollum v. Miller, 695 F.2d 1044, 1046 (7th Cir. 1982); Streeter v. Hopper, 618 F.2d 1178, 1181 (5th Cir. 1980) Krist v. Ricketts, 504 F.2d 887-88 (5th Cir. 1974). These decisions do not, however, evidence a conflict with the Ninth Circuit's decision in this case. They simply approve an inmate's use of the writ of habeas corpus to seek a transfer from one type of confinement to another. They do not address the availability of judicial review of lock-up retention decisions as a remedy in a comprehensive 42 U.S.C. § 1983 action.

Boudin involved a single federal prisoner's complaint, treated as a habeas

corpus petition, challenging her conditions of confinement in lock-up and seeking transfer to the general prison population. In this context, the Second Circuit held that "habeas is the appropriate action to challenge conditions of confinement where the prisoner seeks to be moved in order to remedy past constitutional violations." 732 F.2d at 1111. That court did not hold or suggest, however, that a Section 1983 action would be improper. Nor did it hold or suggest that a district court lacked the authority in a Section 1983 class action to order transfers as part of a comprehensive Eighth Amendment and due process remedy.

McCall-Bey involved district court enforcement of a consent decree in a Section 1983 class action. The Seventh Circuit reviewed the district court's

order for return of an inmate to a work release program on the merits and reversed, without questioning the district court's authority to make such an order in an appropriate case. The Seventh Circuit also speculated that the inmate's letter initiating the district court action could have been construed either as a habeas corpus petition or a new Section 1983 complaint. 777 F.2d at 1191.

Jackson was a consolidated appeal involving five habeas corpus petitions filed by federal prisoners seeking due process review of disciplinary lock-ups. Four of the petitioners alleged denial of good time credits. In these circumstances, which involved no complaint about conditions of confinement or Eighth Amendment class issues, the Seventh Circuit held that "the suit may

be maintained as a habeas corpus suit." 707 F.2d at 946.

McCollum also involved consolidated appeals in the several habeas corpus proceedings involving due process claims of four federal inmates. One inmate complained about a disciplinary confinement to lock-up. The Seventh Circuit held "that habeas corpus can be used to get from a more to a less restrictive custody . . . ." 695 F.2d at 1046. That court did not state or imply that a Section 1983 action would be improper or that a release remedy could not be imposed in such an action that challenges conditions of confinement in lock-up under the Eighth Amendment.

In Streeter v. Hooper, 618 F.2d 1178 (5th Cir. 1980), the Fifth Circuit treated two Georgia state prisoners' habeas corpus petitions, seeking transfer

to an institution at which their safety could be assured, as though the petitions were a 42 U.S.C. § 1983 complaint challenging these plaintiffs' conditions of confinement under the Eighth Amendment. The Fifth Circuit held that a complaint "seeking release from the imposition of administrative segregation without due process, would be appropriately treated as a habeas corpus petition, requiring exhaustion of state judicial remedies." 618 F.2d at 1181. However, the court specifically held that the Eighth Amendment claim was "within the ambit of § 1983 and exhaustion of state judicial remedies is not required." Id. Compare Krist v. Ricketts, 504 F.2d 887 (5th Cir. 1974) (a pre-Preiser decision involving a single state inmates procedural due process claim). Plainly, the Fifth Circuit's approach is

consistent with the Ninth Circuit's decision in this case at least as to the availability of a transfer remedy in a Section 1983-Eighth Amendment conditions of confinement case; and the Ninth Circuit's decision here is plainly correct.

II.

CONSIDERED ON THE RECORD OF THIS CASE, THE NINTH CIRCUIT'S DECISION REQUIRING THAT PLAINTIFFS BE AFFORDED MEANINGFUL PHYSICAL ACCESS TO AN ADEQUATE LAW LIBRARY AND/OR A LEGAL ASSISTANCE PROGRAM RAISES NO IMPORTANT UNRESOLVED ISSUE OF LAW AND PRESENTS NO CONFLICT AMONG THE CIRCUITS.

Prisoners have a fundamental right to "adequate, effective and meaningful access to the courts." Bounds v. Smith, 430 U.S. 817, 822 (1977). The right of access to the courts requires prison authorities to assist prisoners to prepare and file legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law. Id. at 828.

The defendants purport to have met their obligation under Bounds by providing lock-up inmates access to law books through a "paging" system which allows them the opportunity to order a few books at a time from the law library.

Toussaint v. McCarthy, supra, 597 F.Supp. at 1403 (Pl.App. 231-33). The books are supposed to be delivered to their cells a few days later and must be returned within a few days. Ibid. No qualified legal assistants are available to help lockup inmates in identifying the appropriate legal authorities and resource books to consult. Ibid.

The district court found that "effective legal research under the current paging system is virtually impossible," id. at 1403 (Pl.App. 232), and concluded that "even an individual highly trained in the law would be unable to secure meaningful access to the courts through such a system." id. at 1413 (Pl.App. 286-87).

The district court also found that:

> The prison libraries themselves are incomplete and over-taxed. Volumes are missing from most commonly-used sets, as are recent

> supplements to codes. Libraries at both prisons lack basic treatises and instructional texts. Demand for books in the existing collection at San Quentin is so great that an unmanageable backlog of hold requests has accumulated. The library director stated that he will be forced henceforth to abolish the system of hold requests. Lockup inmates will instead be required to request desired books continuously until the books happen to be available. Lockup inmates have no way to learn of the return of volumes they seek.
>
> Id. at 1403, Pl.App. 232-33.

On this record, the district court held the paging system constitutionally deficient, Id. at 1413, (Pl.App. 285-86), and enjoined defendants as follows:

> In the absence of specific and compelling security reasons, documented in writing, all prisoners assigned to segregation shall be permitted to visit and use an adequate prison law library as reasonably necessary. Any prisoner denied direct access to the law library for documented reasons of security shall be permitted to order at least five books per week from that library. Books so ordered shall be

> delivered promptly and without fail. Each prisoner assigned to segregation shall be provided upon request with a complete listing of all books available in the prison law library and all books, if any, available to prisoners from other sources.
>
> Id. at 1424, Pl.App. 341.

The Ninth Circuit sustained the district court's findings that the paging system was inadequate, and held that the paging system remained inadequate even as "improved" by the district court. 801 F.2d at 1108-1110, Pl.App. 116-124. Noting that the district court's allowance of "a limited use of the paging system merely recognizes defendants' interest in institutional security," Id. at 1109 (Pl.App. 120), the Ninth Circuit held that the great weight of authority supported plaintiffs' request for legal assistance for all prisoners denied physical access to the law libraries,

id. at 1110 (Pl.App. 122-24). The Ninth Circuit held therefore that:

> all prisoners are entitled to meaningful access to the courts. If the state denies a prisoner reasonable access to a law library, the state must provide that prisoner legal assistance. If the parties fail to agree on a plan that provides meaningful access to the courts, the district court shall fashion one that comports with the requirements established this opinion.
>
> Id. at 1110, Pl.App. 124 (emphasis in original).

Proceedings are presently occurring before the district court and its Monitor, pursuant to the Ninth Circuit's mandate; and no new legal access remedy has yet been agreed to or imposed.

The defendants appear to argue in their Petition for Writ of Certiorari that the improved paging system ordered by the district court will provide constitutionally adequate access to the

courts for all lockup inmates. Defendants' Petition at 19-21. Defendants also appear to argue that the Ninth Circuit opinion goes beyond Bounds by forcing them to provide plaintiffs with "both, rather than one, of the alternative options presented by Bounds." Id. at p. 21. Finally, defendants appear to suggest that plaintiffs in the instant case are less deserving of the court access right than most or other inmates. Id. at 17-18, 21-22.

In fact, however, as the Ninth Circuit concluded, the paging system alone does not provide constitutionally adequate access for the lock-up prisoners whose rights are the subject of this case. Moreover, neither the Ninth Circuit, the district court, nor the district court's Monitor has yet ordered a new library access remedy, much less

any mixture of Bounds alternatives. And, the defendants' attempt to distinguish the constitutional legal access rights of lock-up inmates from those of other inmates is inappropriate under the Bounds standards. See 430 U.S. at 828-32.

In implementing this Court's decision in Bounds the lower federal courts have held that defendants bear the burden of proving that their provisions for legal research or legal assistance are adequate. Rich v. Zitnay, 644 F.2d 41, 43 (1st Cir. 1981); Ramos v. Lamm, 639 F.2d 559, 583-85 (10th Cir. 1980); Cruz v. Hauck, 627 F.2d 710, 719 (5th Cir. 1980). In the instant case, defendants did not meet their burden of showing that a "paging" system is adequate.

Numerous courts have analyzed why paging systems such as those at San Quentin and Folsom are incapable of providing meaningful access to the courts. As one court stated:

> Simply providing a prisoner with books in his cell, if he requests them, gives the prisoner no meaningful chance to explore the legal remedies he might have. Legal research often requires browsing through various materials in search of inspiration .... It is unrealistic to expect a prisoner to know in advance exactly what materials he needs to consult. It is completely unrealistic to expect lay persons to know the names of the law books they will need for research on a legal problem, so that these can be requested from a guard.
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> Williams v. Leeke, 584 F.2d 1336, 1338-39 (4th Cir. 1978), cert. denied, 441 U.S. 911 (1979).

Accord Morrow v. Harwell, 768 F.2d 619, 623 (5th Cir. 1985); Rich v. Zitnay, 644 F.2d 41, 43 (1st Cir. 1981);

Cruz v. Hauck, 627 F.2d 710, 720-21 (5th Cir. 1980); Kendrick v. Bland, 586 F.Supp. 1536, 1557 (W.D.Ky. 1984) (paging system inadequate even with telephonic counsel of inmate legal aids); Martino v. Carey, 563 F.Supp. 984, 1003-1004 (paging system is a "Catch 22").

Consequently, the Bounds' requirement of adequate access to law libraries has been interpreted by the majority of lower courts to require physical access, except where prisoners have the alternative of access to in-person assistance from qualified individuals trained in the law. Kendrick v. Bland, 586 F.Supp. 1536, 1549-1562 (W.D.Ky. 1984). Accord Green v. Ferrell, 801 F.2d 765 at 772 (5th Cir. 1986); Morrow v. Harwell, 768 F.2d 619, 623 (5th Cir. 1985);

Corgain v. Miller, 708 F.2d 1241, 1248-50 (7th Cir. 1983); Williams v. Leeke, supra, 584 F.2d at 1338-1339; Martino, supra, 563 F.Supp.a t 1003-1004; Canterino v. Wilson, 562 F.Supp. 106, 110 (W.D.Ky. 1983); see also Cepulonis v. Fair, 732 F.2d 1, 5-6 (1st Cir. 1984).[1/]

1/ In fact, many cases upholding "paging" systems did so in the context of factual findings that inmates also had access to the assistance of persons trained in the law. Williams v. Wyrick, 747 F.2d 1231, 1232 (8th Cir. 1984) (appointed lawyer and paralegals); Lovell v. Brennan, 566 F.Supp. 672, 696 (D.Maine 1983) (attorney and paralegals); Frazier v. Ward, 426 F.Supp. 1354, 1356, 1371 (N.D.N.Y. 1977) (attorneys). Indeed there is ample precedent that in particular cases a mixture of library access and/or paging and legal assistance may be appropriate depending on the specific facts of the case. Cepulonis v. Fair, 732 F.2d 1, at 6 (1st Cir. 1984); Smith v. Bounds, 610 F.Supp. 597, 603 (E.D.N.C. 1985); ___ F.Supp. ____ (E.D.N.C., April 10, 1986 Civ. Nos. 3052, 4277 and 790), affirmed ____ F.2d ____, (4th Cir. March 20, 1987 No. 86-7579).

The district court concluded in 1983 that there were "serious questions" as to the constitutionality of defendants' paging system. Hence, the preliminary injunction issued that year and sustained by the Ninth Circuit ordered the defendants to provide reasonable opportunities for the study of law books. Toussaint v. Rushen, supra, 553 F.Supp. at 1373-74, 1380, 1385 (Pl.App. 468-69, 505, 530-31). At the time of trial, the district court found defendants' then-current library access practices constitutionally deficient. Toussaint v. McCarthy, 593 F.Supp. at 1403, 1413 (Pl.App. 231-33, 285-87). Where there have been such violations of prior court orders, additional relief is permissible. See, e.g., Cruz v. Hauck, 627 F.2d 710, 720-21 (5th Cir. 1980). See also, Bounds on remand.

Finally, Defendants' claimed conflict between the Ninth Circuit and the Seventh and Eleventh Circuits does not exist. Plainly, the appropriate remedy for denial of access turns largely on the unique facts and circumstances in the record of each case. Ramos v. Lamm, 639 F.2d 559, 583 (10th Cir. 1980) cert. denied, 450 U.S. 1041 (1981); Walters v. Thompson, 615 F.Supp. 330, 340 (D.C.Ill. 1985). Within the framework of this case-by-case analysis, the circuit decisions cited by defendants do not conflict with each other, nor does the Ninth Circuit holding in the instant case in any way conflict with Bounds itself.

On the facts of Hooks v. Wainwright, 775 F.2d 1433 (11th Cir. 1985) the Eleventh Circuit simply held that the district court in Florida had overreached its authority when it "held that any

acceptable plan for assuring Florida prisoners meaningful access to the courts as required by Bounds [citation omitted], must include a provision for the assistance of counsel." Id. at 1433 (emphasis in original). Neither the district court here, nor the Ninth Circuit, has made such a broad ruling. The Ninth Circuit merely has remanded, given the record in this case, for the district court to order a plan that provides meaningful access through physical access for all lockup inmates to an adequate law library and/or legal assistance. The actual plan is presently being litigated in the district court. All that is final on this issue at this point is the Ninth Circuit's determination, based on the record made in the district court, that the defendants' paging system, even as

improved by the district court, is constitutionally inadequate.

Similarly, the Seventh Circuit's recent decisions involving law library access by federal lock-up inmates and federal general population inmates in lock-down status at the United States Penitentiary at Marion, Illinois do not evidence a conflict with the Ninth Circuit.[2/]

2/ Arsberry v. Sielaff, 586 F.2d 37 (7th Cir. 1978), decided approximately a year after Bounds, contains no reasoned discussion of law library access issues or facts, and merely recognizes the truism that even after Bounds "the Supreme Court gives substantial leeway to the discretion of prison authorities in this regard." 586 F.2d at 44. Plainly the Ninth Circuit has properly considered the appropriate amount of discretion to be afforded the defendants in this case, who for years have been operating unconstitutional lock-up units and violating court orders concerning law library access and other subjects, and who have been found to be unable to

(Footnote Continued)

In both Campbell v. Miller, 787 F.2d 217 (7th Cir. 1986) and Caldwell v. Miller, 790 F.2d 589 (7th Cir. 1986) there were no findings of inadequacy of paging systems, or of inadequate physical access either to unit or to prison-wide libraries. There also was no evidence of past violations of court orders concerning legal access. On the records before it, the Seventh Circuit was simply adopting "the conclusion reached by the Ninth Circuit in Lindquist v. Idaho State Board of Corrections, 776 F.2d 851, 858 (9th Cir. 1985):

> '[T]he Constitution does not guarantee a prisoner unlimited access to a law library. Prison officials of necessity must regulate the time, manner, and place in which library facilities are used .... The fact that an inmate must wait for a turn to

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(Footnote Continued)

operate a constitutionally adequate paging system.

> use the library does not necessarily mean that he has been denied meaningful access to the courts.'"
>
> Campbell, supra, 787 F.2d at 227.

Given the Ninth Circuit's general position on law library access issues, as stated in Lindquist and specifically adopted by the Seventh Circuit, there is no conflict between these Circuits or between the Ninth and Eleventh Circuits. Further, this Court should not grant the Defendants' Petition to address law library or court access issues that are still unripe in this case, and that are fact intensive in any event.

CONCLUSION

On the record of this case, Defendants' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

SANFORD JAY ROSEN
(Counsel of Record)

Attorneys for Respondents

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